2013 IL App (5th) 120396-U

NOS. 5-12-0396 & 5-12-0407 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEPSI MIDAMERICA, INC., Plaintiff-Appellant, v. BARTLEY R. MULLINAX and DYNAMIC VENDING, Defendants-Appellees, and PEPSI MIDAMERICA, INC., Plaintiff-Appellant, v. RONALD C. HERMAN, CRYSTALYN HUGE, STEVEN L. SHEHORN, and DYNAMIC VENDING, Defendants-Appellees.	)	Appeal from the Circuit Court of Jefferson County. No. 10-CH-98 Honorable Mark R. Stanley, Judge, presiding. No. 10-L-57 Honorable David K. Overstreet, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Spomer and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgments and orders imposing sanctions pursuant to Supreme Court Rule 137 affirmed in this suit to enforce employees' agreements not to compete.

¶ 2 Pepsi MidAmerica, Inc. (Pepsi), appeals from summary judgments entered against it and from orders imposing sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb.

1, 1994) for filing false or frivolous pleadings in these consolidated actions brought by Pepsi against its former employees, Ronald C. Herman, Crystalyn Huge, Steven L. Shehorn, Bartley R. Mullinax, and their new employer, Dynamic Vending. Pepsi had brought suit in the circuit court of Jefferson County against its former employees alleging their breach of a noncompete agreement, and against Dynamic Vending for tortiously interfering with the noncompete agreement by luring Pepsi's former employees away from Pepsi into employment with Dynamic Vending. For reasons which follow, we affirm the summary judgments and the orders imposing sanctions.

¶ 3 According to the complaints, Mullinax had been employed as Pepsi's Mt. Vernon snack district manager and division channel manager until he resigned on September 20, 2010. Shortly thereafter, Mullinax began employment with Pepsi's direct competitor in the vending business, Dynamic Vending. While employed with Pepsi, Mullinax had gained confidential and proprietary knowledge of Pepsi's business. The complaint alleged that Mullinax had provided that confidential information to Dynamic Vending, which had used it to lure several of Pepsi's customers away. The complaint alleged that by doing so, Mullinax had violated a "Management Non-Compete Agreement" with Pepsi that provided in pertinent part as follows:

> "I will not work in any area or on any project with a competitor of Pepsi MidAmerica for a period of one (1) year. I further agree that I will not divulge to any other person, firm or corporation during the period of my employment with Pepsi MidAmerica, or at any time thereafter of [*sic*] a period of one (1) year, the names of our customers, trade secrets ***, pricing and marketing strategies ***, or any other confidential information *** for a period of one (1) year from the date my employment ceases with Pepsi MidAmerica, within any territory or branch area serviced by Pepsi MidAmerica."

The complaint alleged that Mullinax had divulged confidential information to Dynamic Vending and had used that information against Pepsi. The complaint further alleged that Dynamic Vending had knowledge of the noncompete agreement and, "based on information and belief," Dynamic Vending had willfully and wantonly induced Mullinax to separate employment with Pepsi and breach the noncompete agreement.

¶ 4 Similar allegations were made against Herman, who worked for Pepsi as a route driver, against Shehorn, who worked for Pepsi as a vending tech, and against Huge, who worked for Pepsi servicing a snack route. The noncompete agreement of these latter three employees differed from that applicable to Mullinax, who was considered a management employee. The "Sales Non-Compete Agreement" applicable to Herman, Shehorn, and Huge provided that they could not compete with Pepsi for a period of two years after termination of their employment by engaging in work for any competitor of Pepsi within a 50-mile radius of any Pepsi facility. These employees also agreed not to solicit any customer of Pepsi or to give out confidential information to any competitor of Pepsi. These three employees began working for Dynamic Vending shortly after terminating their employment with Pepsi. Pepsi claims its former employees breached the sales noncompete agreement in two ways: by working for a competing vending company and by disclosing confidential information to their new employer.

¶ 5 On August 4, 2011, the circuit court entered summary judgment against Pepsi and in favor of Dynamic Vending on Pepsi's claim that Dynamic Vending had tortiously interfered with Pepsi's noncompete agreement with Mullinax. The court found that there was no genuine question of material fact that Dynamic Vending had not tortiously interfered with the noncompete agreement between Mullinax and Pepsi because there was no evidence that Mullinax had ever worked for Dynamic Vending in an area also serviced by Pepsi. The undisputed evidence showed that Mullinax had only worked for Dynamic Vending in the St.

Louis, Missouri, area, a territory which Pepsi admitted was not included in the noncompete agreement. Furthermore, Pepsi failed to present any evidence that Mullinax had provided confidential information to Dynamic Vending. Both Mullinax and Dynamic Vending had presented evidence that Mullinax had never disclosed such information.

¶ 6 On November 9, 2011, on the motion of Dynamic Vending, the circuit court entered against Pepsi an order for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) incorporating therein the findings and statements made by the court in its summary judgment order. The court found that Pepsi's complaint and affidavit, both signed by Pepsi's division manager, Brian House, were signed and filed without a reasonable inquiry as to the facts and that the representations contained therein were inaccurate. The pleadings were not well grounded in fact or law, and the position of Pepsi was unreasonable and without a factual basis regarding the alleged improprieties of Dynamic Vending. Pepsi was ordered to pay the attorney fees, costs, and expenses Dynamic Vending incurred in defending the suit.

¶ 7 On November 8, 2011, the circuit court entered summary judgment against Pepsi and in favor of Dynamic Vending, Herman, Huge, and Shehorn. The court found that the sales noncompete agreements were unenforceable as a matter of law and that there was no evidence that Herman, Huge, or Shehorn had ever possessed confidential information, or that if they had, that they had disclosed it to Dynamic Vending. The court also found that Dynamic Vending could not be held liable for tortiously interfering with the unenforceable noncompete agreements and that the undisputed evidence showed that Dynamic Vending did not induce Herman, Huge, or Shehorn to leave their employment with Pepsi.

¶ 8 On August 20, 2012, the circuit court entered an order for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) incorporating the findings and statements the court made in its summary judgment order. The court found that Pepsi's division manager Brian House had admitted that there was no evidence that Herman, Huge, or

Shehorn had ever shared any confidential information with Dynamic Vending, and that Pepsi's attempt to enforce against Herman, Huge, and Shehorn the unenforceable noncompete agreements was not well grounded in fact or warranted by existing law or a good-faith argument for its extension, modification, or reversal. Furthermore, Pepsi had failed to produce any credible evidence that Dynamic Vending had induced Herman, Huge, or Shehorn to leave their employment with Pepsi and breach their agreements with Pepsi. The complaints signed by Brian House and filed by Pepsi were signed and filed without reasonable inquiry as to the facts, and House's representations were not well grounded in fact. Pepsi was ordered to pay the defendants' fees, costs, and expenses incurred in defending the suit.

¶ 9 We will first address Pepsi's appeals from the two summary judgments entered against it. We conduct *de novo* review of the grant of summary judgment. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 30 (1999). Summary judgment is proper where the pleadings, depositions, admissions, affidavits, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Petrovich*, 188 Ill. 2d at 30-31. A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts. *Petrovich*, 188 Ill. 2d at 31. The court must consider all the evidence before it strictly against the movant and liberally in favor of the nonmovant. *Colvin v. Hobart Brothers*, 156 Ill. 2d 166, 170 (1993). Although summary judgment is an expeditious method of disposing of a lawsuit, it is a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt. *Petrovich*, 188 Ill. 2d at 31.

¶ 10 We turn first to the summary judgment entered against Pepsi on its claim that

Dynamic Vending tortiously interfered with its management noncompete agreement with Mullinax. Pepsi appeals from the summary judgment entered against it and in favor of Dynamic Vending, arguing that the circuit court did not draw all reasonable inferences in favor of Pepsi, the nonmovant, and failed to weigh the circumstantial evidence.

¶ 11 To recover under a theory of tortious interference with a contract, a plaintiff is required to plead and prove the following: (1) the existence of a valid and enforceable contract between the plaintiff and a third party, (2) the defendant was aware of the contract, (3) the defendant's intentional and unjustified inducement of a breach, (4) the defendant's wrongful conduct caused a subsequent breach of the contract by the third party, and (5) resulting damages to the plaintiff. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 727 (2004).

¶ 12 In the case at bar, the circuit court essentially concluded that the plaintiff could not prove that there was any breach of the noncompete agreement. In order to prove such a breach, Pepsi had to show that, within one year of the termination of his employment with Pepsi, Mullinax worked with a competitor of Pepsi within a Pepsi territory, or that, during that year, Mullinax divulged confidential information to a competitor within a territory covered by Pepsi.

¶ 13 Pepsi essentially concedes that there is no direct evidence of a breach of the noncompete agreement. However, Pepsi argues that in order to survive a motion for summary judgment it need only raise a material question of fact, which in turn requires only that it produce evidence from which a reasonable inference could be drawn that Dynamic Vending induced Mullinax to breach his noncompete agreement. Pepsi argues that the circuit court improperly considered the evidence most strongly in favor of Dynamic Vending by rejecting the inferences in favor of Pepsi.

¶ 14 Pepsi argues that it had substantial circumstantial evidence that Mullinax breached the

noncompete agreement in favor of Dynamic Vending. For example, after beginning employment with Dynamic Vending, Mullinax contacted a customer of Pepsi to explain why he had left Pepsi and now worked for Dynamic Vending. Pepsi argues that the circuit court improperly rejected any inference that this contact was a violation of the noncompete agreement. Yet the court specifically stated that, although Mullinax had contacted one of his prior Pepsi customers after he began employment with Dynamic Vending, he did not make any sales efforts on behalf of Dynamic Vending. The court's conclusion is supported by the testimony of Mullinax, and there is no evidence to the contrary.

¶ 15 While many of the underlying circumstances surrounding the termination of Mullinax's employment with Pepsi and the start of his employment with Dynamic Vending, particularly the timing of key Pepsi accounts and employees switching from Pepsi to Dynamic Vending, may lead to a *suspicion* of a breach by Mullinax of the noncompete agreement, the circumstances are not sufficient to lead to a reasonable inference of any such breach without the addition of some direct evidence, of which there is none. Instead, there is ample evidence to the contrary.

¶ 16 Brian House, Pepsi's division manager, admitted in his deposition that he had no evidence that Mullinax ever performed work for Dynamic Vending in southern Illinois. The undisputed evidence demonstrates that after Mullinax began working for Dynamic Vending he did so only in Missouri. With respect to the alleged use by Dynamic Vending of confidential information obtained from Mullinax to lure customers away from Pepsi, the evidence shows that of the six customers which Pepsi lost to Dynamic Vending, five of them switched to Dynamic Vending before Mullinax had ever communicated with Dynamic Vending. These five customers could not have been obtained by using confidential information obtained from Mullinax. Brian House admitted that the sixth customer was lost by Pepsi due to poor service. Finally, even if Mullinax provided information to Dynamic

Vending as to Pepsi employees to recruit, this information is not confidential. These employees were a route driver, a vending tech, and a vending attendant who were hired by Dynamic Vending after it had acquired from Pepsi the six customers Pepsi claimed it lost due to the use of confidential information. There is no evidence any confidential information was obtained from these employees and used by Dynamic Vending.

¶ 17 There simply is no genuine issue of material fact as to whether Dynamic Vending tortiously interfered with the noncompete agreement between Pepsi and Mullinax, and Dynamic Vending is entitled to judgment in its favor as a matter of law.

¶ 18 We turn now to review of the summary judgment entered against Pepsi on its claims against Shehorn, Huge, Herman, and Dynamic Vending. Pepsi argues that the circuit court's finding in its summary judgment that the sales noncompete agreements between Pepsi and Shehorn, Huge, and Herman are unenforceable as a matter of law is erroneous, requiring reversal of both the summary judgment and the order for sanctions. The sales noncompete agreement provided that for the term of his employment and for a period of two years after termination of employment the employee will not compete with Pepsi by engaging in any business or work which directly competes with Pepsi for any competitor of Pepsi within a 50-mile radius of any Pepsi facility. The employee further agrees not to solicit any current customer of Pepsi on behalf of a competitor or to give out confidential information about any Pepsi customer's needs on behalf of any competitor of Pepsi.

¶ 19 Pepsi sued Shehorn, Huge, and Herman alleging that they had breached the noncompete agreement with Pepsi; Pepsi sued Dynamic Vending alleging that it had tortiously interfered with the noncompete agreement between it and its three employees. The complaint alleged that at the time the employees left their employment with Pepsi and went to work for Dynamic Vending, they knew the identities and marketing strategies of Pepsi's clients, which knowledge was vital to the operations and relationships between Pepsi and its

customers; that they provided this information to Dynamic Vending, which used it to lure Pepsi clients away; and that the employees disclosed confidential information to Dynamic Vending and used it against Pepsi. The complaint against Dynamic Vending alleged that it induced the employees to violate the noncompete agreement in the aforementioned ways.

¶ 20 The circuit court held as a matter of law that the noncompete agreements were unenforceable and could not be subject to breach or tortious interference. Accordingly, summary judgment was entered against Pepsi and in favor of the three employees and Dynamic Vending.

¶ 21 In its summary judgment, the circuit court held that the sales noncompete agreement was unenforceable because it constituted "an unlawful restraint of trade on [the employees'] mobility." The court found that the noncompete agreements were overly broad and unreasonable. The agreements were not designed to simply protect Pepsi's proprietary interests or confidential information, but to prevent ordinary competition. The agreements were unreasonable and overly broad as to time, territory, and activity and constituted an unfair restraint on trade. The employees were not salespeople; they were engaged in servicing the accounts which were sold by Pepsi salespeople. Pepsi had failed to show that preventing these employees from working as a route driver, a vending attendant, or a repair person for a period of two years throughout southern Illinois was reasonably necessary to protect any legitimate business interest.

¶ 22 The court pointed out that the job duties of the three employees did not include sales or confidential information; the employees merely serviced existing accounts. Herman's duties were to drive a truck, fill the truck with product, haul product, keep the vending machines running, and keep the machines filled with product. Huge worked as a vending attendant at the Nascote plant filling soda and food machines, cleaning machines, and taking complaints. Shehorn performed the same duties as did Herman and Huge. To prevent these

employees from performing service duties in the vending business in southern Illinois for two years was not reasonable because their performance of such duties for a competitor of Pepsi would not create unfair or improper competition, which is the purpose of a noncompete agreement. See *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 17 (1993).

¶ 23 The court also found that Pepsi had presented no evidence that the employees possessed confidential information or that if they did, they shared it with Dynamic Vending. Brian House admitted that he had no evidence that the employees had shared any confidential information with Dynamic Vending.

¶ 24 A contract in total and general restraint of trade is void because (1) it injures the public at large by depriving the public of the industry of the promisor, and (2) it injures the individual promisor by depriving him of the opportunity to pursue an occupation and support a family. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 16. However, a restrictive covenant will be upheld if it contains a *reasonable* restraint and is supported by consideration. *Reliable*, 2011 IL 111871, ¶ 16. A restraint is *reasonable* only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. *Reliable*, 2011 IL 111871, ¶ 17. Each case must be determined on its own particular facts, and whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. *Reliable*, 2011 IL 111871, ¶ 42-43.

¶ 25 We find that the circuit court properly analyzed the noncompete agreement at issue here. It concluded that such a broad restriction on these particular employees, who had no proprietary or confidential information of Pepsi's, did not serve any legitimate business interest of Pepsi. The court's conclusion that the noncompete agreements were unreasonable and overly broad to protect any legitimate business interest of Pepsi is not erroneous as a

matter of law. There is no evidence that these employees obtained confidential information as a result of their employment with Pepsi. They simply serviced and filled vending machines. Such a broad and lengthy restriction placed an undue hardship on these employees. Furthermore, there is no evidence that these employees ever provided any confidential information to Dynamic Vending. The circuit court did not err in finding the sales noncompete agreement unenforceable and in entering summary judgment in favor of the defendants.

¶ 26 We now address the propriety of the court's orders for sanctions. The orders for sanctions were entered pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), which requires that every pleading and other document be signed by the attorney of record. The signature of the attorney constitutes a certificate by him that he has read the pleading, motion, or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other document is signed in violation of the rule, the court may impose an appropriate sanction, which may include an order to pay to the other party the amount of reasonable expenses incurred because of the filing, including a reasonable attorney fee. Rule 137 requires that where a sanction is imposed, the judge shall set forth with specificity the reasons and basis of any sanction either in the judgment order itself or in a separate written order.

¶ 27 Trial court decisions on whether to impose sanctions are entitled to considerable deference upon review and will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Irvine*, 215 Ill. App. 3d 629, 637 (1991). Neither a test of good faith nor the signing person's concession that he made a mistake comports with the affirmative obligation

of Rule 137 to make a reasonable inquiry prior to the filing of the pleading. *Irvine*, 215 Ill. App. 3d at 638. Subjective good faith is not sufficient to meet the burden of Rule 137; rather a court must use an objective standard to determine whether a particular inquiry was reasonable, based upon the circumstances that existed at the time the pleading was filed. *Edwards v. Estate of Harrison*, 235 Ill. App. 3d 213, 221 (1992). This standard is met when the pleading has a reasonable basis in fact. *Edwards*, 235 Ill. App. 3d at 221.

¶ 28 A circuit court is said to exceed its discretion regarding the imposition of sanctions under Rule 137 only where no reasonable person would take the view adopted by it; if reasonable persons could differ as to the propriety of the circuit court's actions, then a reviewing court cannot say that the circuit court exceeded its discretion. *Senese v. Climatemp, Inc.*, 289 Ill. App. 3d 570, 582 (1997).

¶ 29 Pepsi appeals the order for sanctions entered against it in its suit against Mullinax and Dynamic Vending, arguing that the order lacked the requisite specificity, that the court used *ex post* rather than *ex ante* analysis, and that the court's factual findings are contrary to the manifest weight of the evidence.

¶ 30 Pepsi first argues that the circuit court's order for sanctions failed to comply with the requirement of Rule 137 that the judge set forth with specificity the reasons and basis of any sanction either in the judgment order itself or in a separate written order. We disagree. The circuit court's order for sanctions incorporates by reference, and in their entirety, the findings and statements made by the court in its summary judgment order. The summary judgment order identifies with specificity the statements of Brian House, who signed the complaint and affidavit on behalf of Pepsi, which the court found to be untrue and unsupported by any evidence. Among those allegations are that Mullinax worked for Dynamic Vending in southern Illinois, and that Mullinax disclosed confidential information to Dynamic Vending. The court pointed out that, although House had signed the complaint and affidavit stating that

Mullinax had breached the noncompete agreement by working for Dynamic Vending in southern Illinois and disclosing confidential information to Dynamic Vending, in his deposition House admitted that he had no evidence that either of these allegations was true. The court concluded that the allegations contained in Pepsi's complaint were made without reasonable inquiry and were not well grounded in fact. The circuit court's order complied with the rule's requirements of specificity.

¶ 31 Pepsi next argues that the circuit court erred in employing *ex post* analysis rather than *ex ante* analysis in determining whether the complaint, at the time it was filed, was well grounded in fact and based on a reasonable inquiry. Pepsi correctly points out that to determine whether a particular inquiry by an attorney or party who has signed a pleading was reasonable, we must look to the facts and circumstances that existed at the time the pleading was filed (*ex ante*) and not to how things actually turned out (*ex post*). *Burrows v. Pick*, 306 Ill. App. 3d 1048, 1054 (1999).

¶ 32 We do not agree that the circuit court employed an *ex post* analysis in imposing sanctions. Brian House admitted that *at the time he signed the complaint* he knew of no facts or evidence to support Pepsi's claim of tortious interference. The court relied on this admission in finding that Pepsi had failed to make a reasonable inquiry before filing its complaint. The court explicitly stated in its order for sanctions that "Pepsi did not have evidence to support its claims at the time it filed this action by verified complaint, and still does not have such evidence." The circuit court based its decision on what Pepsi knew at the time it filed the complaint, not on how things turned out. This is the appropriate analysis. *Burrows v. Pick*, 306 Ill. App. 3d 1048, 1054 (1999).

¶ 33 It appears that the most that can be said is that at the time Pepsi filed its complaint, it had only a *suspicion*, based on the circumstances, that Dynamic Vending had induced Mullinax to violate his noncompete agreement. Pepsi knew of facts that raised a *suspicion*

of tortious interference, but Pepsi's representative, Brian House, admitted that at the time he filed the complaint he had no *evidence* or *facts* to support this suspicion or to render the complaint "well grounded in fact," as required by Supreme Court Rule 137. A pleading cannot be well grounded in fact if, at the time of filing, there is no evidence known to the plaintiff to support its allegations of fact.

¶ 34 Finally, Pepsi argues that in light of the lack of specificity in the sanctions order, the award of sanctions is contrary to the manifest weight of the evidence. Pepsi argues that the court has failed to specify which allegations of the complaint against Dynamic Vending are not well grounded in fact or law.

¶ 35 As we have already stated, the circuit court's order was sufficiently specific and set forth in some detail Pepsi's violations of Rule 137. The summary judgment order which is incorporated in the sanctions order identifies with specificity the statements of Brian House, who signed the complaint and affidavit on behalf of Pepsi, which the court found to be untrue and unsupported by any evidence. Among those allegations are that Mullinax worked for Dynamic Vending in southern Illinois, and that Mullinax disclosed confidential information to Dynamic Vending. The court pointed out that, although House had signed the complaint and affidavit stating that Mullinax had breached the noncompete agreement by working for Dynamic Vending in southern Illinois and disclosing confidential information to Dynamic Vending, in his deposition House admitted that he had no evidence that either of these allegations was true. The court concluded that the allegations contained in Pepsi's complaint were made without reasonable inquiry and were not well grounded in fact. These findings are not contrary to the manifest weight of the evidence, and the circuit court did not abuse its discretion in imposing sanctions pursuant to Rule 137.

¶ 36 We turn now to the sanctions imposed in Pepsi's suit against Herman, Huge, Shehorn, and Dynamic Vending. Pepsi first argues that the circuit court's sanctions order failed to

comply with the requirement of Supreme Court Rule 137 that, "[w]here a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). Again, we find the court's sanctions order to be sufficiently specific. It incorporated by reference all of the court's statements and findings made in its summary judgment order. The order for sanctions specified exactly what allegations of the complaint the court found to be not well grounded in fact: that the employees shared confidential information with Dynamic Vending, and that Dynamic Vending induced the employees to violate the noncompete agreements. Both the summary judgment order and the sanctions order explicitly set forth the allegations which the court found to be without a reasonable basis in fact and that Pepsi had no good-faith basis for making. The court also found that Pepsi's attempt to enforce the noncompete agreement against Shehorn, Huge, and Herman was not warranted by existing law or a good-faith argument for its extension, modification, or reversal. The order for sanctions was sufficiently specific.

¶ 37 Pepsi next argues that the circuit court erred in awarding the defendants their attorney fees as a sanction without first conducting a hearing on the reasonableness of those fees. The defendants filed with their motion for sanctions an affidavit of their counsel detailing their attorney fees and attesting that those fees were reasonable in both the rate and the hours required to perform each task. In its response to the motion for sanctions, Pepsi made no objection to the amount of fees or their reasonableness. At the hearing on the motion for sanctions, Pepsi's counsel stated, "if the Court does get down to an issue of attorney fees, I–I do object in that the amount of $295 an hour–an hour I believe is unreasonable and out of line for attorneys practicing in Southern Illinois." Pepsi did not request a hearing on the reasonableness of attorney fees or ask to call any witnesses to challenge the affidavit of the defendants' counsel. In its order imposing sanctions, the circuit court found that the fees and

costs set forth in the affidavit of defendants' counsel were reasonable and necessary, and that the hourly rate charged by that counsel were appropriate and reasonable for the case. Accordingly, the court awarded the defendants all of the attorney fees as set forth in the affidavit.

¶ 38 We note that even after the order for sanctions was entered awarding the defendants' their attorney fees, Pepsi did not file any motion objecting to the reasonableness of those fees or requesting a hearing on the issue. The defendants submitted evidence in the form of their attorney's affidavit of the reasonableness of the fees; Pepsi did not seek to present any evidence to rebut that affidavit, despite the opportunity to do so. Accordingly, we hold that Pepsi has waived any error in the circuit court's failure to hold a further hearing on the reasonableness of the attorney fees. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 355 (1998) (questions not raised in the trial court cannot be argued for the first time on appeal).

¶ 39 Finally, Pepsi argues again that the circuit court erred in using *ex post* analysis rather than *ex ante* analysis in determining whether to impose sanctions. For the reasons discussed above, we reject Pepsi's argument. As in the suit against Mullinax and Dynamic Vending, we cannot conclude that the circuit court analyzed the question of the imposition of sanctions using an *ex post* rather than an *ex ante* perspective. Pepsi admitted that at the time the complaint was filed it knew of no facts or evidence to support its allegations. This is a sufficient basis on which to impose sanctions under Rule 137.

¶ 40 For the foregoing reasons we affirm the summary judgment and order for sanctions entered against Pepsi and in favor of Dynamic Vending on count IV of Pepsi's complaint alleging tortious interference with the noncompete agreement between Pepsi and Mullinax. We also affirm the summary judgment and order for sanctions entered against Pepsi and in favor of Shehorn, Huge, and Herman and Dynamic Vending.

¶ 41 For the foregoing reasons, the judgments and orders for sanctions entered by the circuit court of Jefferson County are hereby affirmed.

¶ 42 Affirmed.